

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

FEDERAL TRADE COMMISSION and

THE PEOPLE OF THE STATE OF
NEW YORK, by LETITIA JAMES,
Attorney General of the State of
New York,

Plaintiffs,

v.

QUINCY BIOSCIENCE HOLDING
COMPANY, INC., a corporation;

QUINCY BIOSCIENCE, LLC, a
limited liability company;

PREVAGEN, INC., a corporation
d/b/a/ SUGAR RIVER
SUPPLEMENTS;

QUINCY BIOSCIENCE
MANUFACTURING, LLC, a
limited liability company; and

MARK UNDERWOOD, individually
and as an officer of QUINCY
BIOSCIENCE HOLDING
COMPANY, INC., QUINCY
BIOSCIENCE, LLC, and
PREVAGEN, INC.,

Defendants.

Case No. 1:17-cv-00124-LLS

**RULE 56.1 STATEMENT IN
SUPPORT OF CROSS-MOTION
FOR SUMMARY JUDGMENT BY
PLAINTIFF PEOPLE OF THE
STATE OF NEW YORK, BY
LETITIA JAMES, ATTORNEY
GENERAL OF THE STATE OF
NEW YORK**

Pursuant to Local Rule 56.1, Plaintiff People of the State of New York, by Letitia James, Attorney General of the State of New York (“NYAG”), hereby submits the following statement of undisputed facts in support of its cross-motion for summary judgment on the issue of this Court’s personal jurisdiction over Defendant Mark Underwood for the NYAG’s claims in this case. There is no genuine issue with respect to these facts that would preclude judgment in the NYAG’s favor.

These undisputed facts are identical to the facts presented in the NYAG's Statement of Additional Material Facts in its Response to Defendant Mark Underwood's Rule 56.1 Statement, filed May 6, 2022 [Dkt. Nos. 238 & 239].

1. Quincy Bioscience Holding Company, Inc., wholly owns: Prevagen, Inc., which markets, manufactures, and sells Prevagen Products to consumers nationwide; Quincy Bioscience Manufacturing, LLC; and Quincy Bioscience, LLC, the holder of Prevagen-related patents and trademarks. (Declaration of Kate Matuschak in Support of NYAG's Opp. to Def. Underwood's Mot. for Partial Summary Judgment (filed May 6, 2022) [Dkt. Nos. 240 & 241] ("Matuschak Decl.") Ex. C (Defs.' 2d Supp. Resps. to Pls.' 2d Interrogatories (Oct. 23, 2020)) No. 18; Matuschak Decl. Ex. B (Defs.' Resps. to Pls.' Requests for Admission (Sept. 30, 2020)) at 6.)

2. Corporate Defendants share the same officers, including individual Defendant Mark Y. Underwood. (Matuschak Decl. Ex. F (Underwood 8/21/20 Tr.) at 37:13-38:6.)

3. Corporate Defendants share the same Board of Directors, and Underwood serves on that board. (Matuschak Decl. Ex. F (Underwood 8/21 Tr.) at 37:13-38:6.)

4. Underwood is the co-founder, President, and Chief Operating Officer of Corporate Defendants. (Matuschak Decl. Ex. B (Defs.' Resps. to Pls.' 1st Requests for Admission (Sept. 30, 2020)) No. 99.)

5. Underwood has participated in creating content for Prevagen television and radio ads and is the final decision maker on final advertising claims. (Matuschak Decl. Ex. B (Defs.' Resps. to Pls.' 1st Requests for Admission (Sept. 30, 2020) at 62-63; Matuschak Decl. Ex. J (Quincy's Answers to FTC's CID Interrogatories (Sept. 15, 2015) at 6 [REDACTED]

[REDACTED]
[REDACTED];
Matuschak Decl. Ex. E (Underwood 8/20/20 Tr.) at 99:5-11 (describing Underwood's involvement

in determining what data to include in an advertisement); Matuschak Decl. Ex. F (Underwood 8/21/20 Tr.) at 46:6-47:11 (discussing leadership role in developing marketing messaging); *id.* at 60:2-5 (discussing role in approving edits to Prevagen’s packaging); *id.* at 67:16-68:12 (discussing Underwood’s role in an infomercial that aired in New York); *id.* at 80:16-82:5 (same); *id.* at 85:2-86:17 (discussing Underwood’s role in translating scientific data into marketing language); Matuschak Decl. Ex. G (Olson 8/4/20 Tr.) at 63:2-9 (discussing Underwood’s role in drafting scripts for radio advertisements); *id.* at 78:1-21 (describing Underwood as one of the “primary people” drafting content for television commercials).)

6. Underwood is the largest individual shareholder of Quincy Bioscience Holding Company, Inc. (Matuschak Decl. Ex. O (9/19/2016 Executed Corporate Financial Form) at 3 & Item 7.)

7. Underwood originated the idea to create Prevagen with the active ingredient apoeaquorin based on independent research he did as a hobby while he was an undergraduate student. (Matuschak Decl. Ex. F (Underwood 8/21/20 Tr.) at 29:12-32:6.)

8. Underwood participated in naming Prevagen and designing and editing the product labels and packaging. (Matuschak Dec. Ex. F (Underwood 8/21/20 Tr.) at 60:2-5.)

9. Underwood is listed as an inventor on patents for aequorin (from which Prevagen’s active ingredient, apoeaquorin, was derived) and apoeaquorin. (Matuschak Decl. Ex. F (Underwood 8/21/20 Tr.) at 31:23-32:6.)

10. Underwood has appeared in infomercials on TV and radio to promote Prevagen. (Matuschak Decl. Ex. F (Underwood 8/21/20 Tr.) at 51:14-52:7 (discussing appearance on untitled infomercial); *id.* at 67:16-68:12 (discussing appearance on infomercial “The Better Memory Show”); *id.* at 80:16-82:5 (same); Matuschak Decl. Ex. G (Olson 8/4/20 Tr.) at 62:4-25 (noting that Mr. Underwood was “the primary” person who conducted radio interviews advertising Prevagen).)

At least one of those infomercials in which Underwood appeared aired on specific television stations in the State of New York. (Matuschak Decl. Ex. C (Defs.' 2d Supp. Resps. to Pls.' 2d Interrogatories (Oct. 23, 2020)) Ex. A (detailing dissemination schedule for infomercials that aired on New York-specific television and radio stations).)

11. Underwood has direct oversight over Corporate Defendants' financial condition, research and development, and sales and marketing. Corporate Defendants' chief financial officer and the directors of sales and marketing, market development, business development, systems and logistics, national accounts, human resources, technical and quality, manufacturing sciences, and media procurement all report directly to Underwood. (Matuschak Decl. Ex. F (Underwood 8/21 Tr.) at 34:1-21, 40:19-41:21.)

12. In his role as President of Corporate Defendants, Underwood oversaw, and continues to oversee, the development, conduct, and evaluation of scientific research, including the Madison Memory Study, on which Defendants' advertising claims are based. (Matuschak Decl. Ex. J (Quincy's Answers to FTC's CID Interrogatories (Sept. 15, 2015)) No. 4 [REDACTED])

[REDACTED]; Matuschak Decl. Ex. P (Lerner 8/6/20 Tr.) at 30:8-24 (noting that Underwood was involved in discussions about the Madison Memory Study and in writing up the results); *id.* at 43:17-24 (noting that Underwood was the sole person who decided to conduct the Madison Memory Study); Matuschak Decl. Ex. F (Underwood 8/21/20 Tr.) at 82:24-84:23 (discussing Underwood's role in the Madison Memory Study); *id.* at 88:14-90:9 (same); *id.* at 91:11-92:20 (same).)

13. Prevagen advertisements have been disseminated to consumers nationwide, including in the State of New York, through a variety of media, including but not limited to

television, radio, the internet, and product labeling and packaging. ((Rule 56.1 Statement in Support of Mark Underwood’s Motion for Partial Summary Judgment (filed Mar. 18, 2022) [Dkt. No. 212] ¶ 10 (“Advertising and marketing for Prevagen is national in scope.”); Defs.’ Answer (Aug. 7, 2019) [Dkt. No. 73] ¶¶ 23-24 (confirming that Prevagen has been advertised through various means, including television); Matuschak Decl. Ex. C (Defs.’ 2d Supp. Resps. to Pls.’ 2d Interrogatories) No. 3 & Ex. A (television); *id.* No. 4 & Ex. A thereto (radio); *id.* no. 8 (labeling and packaging); Matuschak Decl. Ex. G (Olson 8/4/20 Tr. at 33:24-34:6 (internet).) Indeed, Defendants do not dispute that “Prevagen advertisements have been disseminated to consumers nationwide, including in the State of New York, through a variety of media, including television, radio, print, the internet, social media, product labeling and packaging, and press releases, including during the time periods shown in [Exhibit H to the Matuschak Declaration].” (Matuschak Decl. Ex. I (Defs.’ Resps. & Proposed Counter-Findings to Pls.’ Proposed Findings of Fact (Mar. 3, 2022)) at 15.)

14. Defendants have marketed Prevagen nationally on television since at least [REDACTED]. (Matuschak Dec. Ex. I (Defs.’ Resps. & Proposed Counter-Findings to Pls.’ Proposed Findings of Fact (Mar. 3, 2022)) at 15.) Defendants do not dispute that Prevagen has been marketed on the radio since at least [REDACTED]. (*Id.* at 24.)

15. Defendants’ television, radio, and internet advertisements, as well as Prevagen product packaging, have made the claims at issue in this case. (Matuschak Decl. Ex. I (Defs.’ Resps. & Proposed Counter-Findings to Pls.’ Proposed Findings of Fact (Mar. 3, 2022) at 15-33.)

16. Defendants, including Mr. Underwood, created, edited, reviewed, approved, and placed the advertisements for Prevagen. (Matuschak Decl. Ex. C (Defs.’ 2d Supp. Resps. to Pls.’ 2d Interrogatories (Oct. 23, 2020)) No. 7.)

17. Defendants' New York State sales, from 2011 to present, totaled (in terms of bottles and revenue amount, for each year):

[REDACTED]

(Matuschak Decl. Ex. D (Defs.' 4th Supp. Resps. to Pls.' 1st Interrogatories (Oct. 23, 2020)) No. 1.)

Date: May 20, 2022

Respectfully submitted,

LETITIA JAMES
Attorney General of the State of New York

/s/ Kate Matuschak
Jane M. Azia
Bureau Chief
Kate Matuschak
Assistant Attorney General
28 Liberty Street
New York, NY 10005
Tel: (212) 416-6189; Fax: (212) 4416-2003
Email: kate.matuschak@ag.ny.gov

¹ Defendants continue to sell Prevagen in the State of New York, but the NYAG has not yet received the updated data from Defendants. (See Matuschak Decl. ¶ 17.)

CERTIFICATE OF SERVICE

I certify that on this 20th day of May 2022, I served via ECF the foregoing Rule 56.1 Statement in Support of Cross-Motion for Summary Judgment by Plaintiff People of the State of New York, by Letitia James, Attorney General of the State of New York, to the attorneys of record on the Service List below.

/s/ Kate Matuschak
Kate Matuschak

Geoffrey W. Castello, III.
Glenn T. Graham
Jaclyn M. Metzinger
Kelley Drye & Warren LLP
3 WTC, 175 Greenwich St.
New York, NY 10007
(212) 808-7800
gcastello@kelleydrye.com
ggraham@kelleydrye.com
jmetzinger@kelleydrye.com
Attorneys for Quincy Bioscience Holding Co., Inc., Quincy Bioscience, LLC, Prevagen Inc., Quincy Bioscience Manufacturing, LLC

John H. Villafranco
Kelley Drye & Warren LLP
Washington Harbour, Suite 400
3050 K Street, NW Washington,
D.C. 20007
(202) 342-8423
jvillafranco@kelleydrye.com
Attorneys for Quincy Bioscience Holding Co., Inc., Quincy Bioscience, LLC, Prevagen Inc., Quincy Bioscience Manufacturing, LLC

Michael B. de Leeuw
Tamar S. Wise
Cozen O'Connor
3 WTC, 175 Greenwich St
55th Floor
New York, NY 10007
(212) 908-1331
mdeleeuw@cozen.com
twise@cozen.com
Attorneys for Mark Underwood

John B. Kelly
Wachtell, Lipton, Rosen & Katz
51 W. 52nd Street
New York, NY 10019
(212) 413-1000
jbkelly@wlrk.com
Attorneys for Mark Underwood

Annette Soberats
Edward Glennon
Andrew Wone
Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Washington, DC 20850
(202) 326-2921
asoberats@ftc.gov
eglennon@ftc.gov
awone@ftc.gov
Attorneys for Plaintiff Federal Trade Commission